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13 UNITED STATES DISTRICT COURT
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA
15

16 UNITED STATES OF AMERICA,)	
)	No. 9373-(WMB) -CD
17 Plaintiff,)	
)	MEMORANDUM IN SUPPORT OF
18 vs.)	<u>MOTION FOR MISTRIAL</u>
)	
19 ANTHONY JOSEPH RUSSO, JR.,)	
20 DANIEL ELLSBERG,)	
)	
21 Defendants.))	
)	
22 _____)	

23 On August 9, 1972, the defendants filed a Motion for
24 Mistrial seeking dismissal of the jury because of the prospective
25 lengthy delay before the trial would begin. The defendants also
26 submitted with the Motion for Mistrial a conditional waiver of
27 double jeopardy claims that might arise from a dismissal of the
28 jury.

29 At the time that the Motion for Mistrial was filed,
30 the jury already had been impanelled for almost two weeks. The
31 defendants' counsel pointed out that the earliest time at which
32 the trial could be reconvened would be October 9th, in the event

when was
the jury
impanelled
late
sup

1 that the Supreme Court denied certiorari. (Tr. at 5090).
2 Counsel argued that since the cumulative delay on October 9th
3 would be almost three months, it would be inevitable that even
4 the most conscientious juror would be infected by the highly
5 charged atmosphere surrounding the case.

6 Rather than ruling on the motion immediately, the
7 court took it under submission, stating that a determination
8 "will be made at the appropriate time." (Tr. at 5102). Events
9 that have occurred in the intervening period make it most
10 appropriate that the court now grant the motion.

11 (1) Even though the Supreme Court has denied
12 certiorari, the delay that already has occurred far exceeds what
13 was contemplated at the August 9th hearing. A major part of the
14 responsibility for the further delay lies with the Government,
15 which waited until the last day possible (October 13th - fifty
16 days after the filing of the Petition for Certiorari) to file
17 its Brief in Opposition. Had the Government filed its opposition
18 in a more timely fashion in accordance with its view that further
19 delay in this case was inappropriate, it is quite possible that
20 the court could have decided the certiorari issue at its first
21 conference, before it was deluged with new matters. In any
22 event, it now seems that the earliest possible date at which the
23 trial may be resumed is on or about December 1, 1972, more than
24 four months after the jury was first empanelled.

25 The term of the current jurors ended in September,
26 1972. They originally agreed to stay on beyond that term for
27 the duration of a trial that they believed would commence in late
28 July or very early August, and that would end by about Thanks-
29 giving or certainly by the end of the year, at the latest.
30 Instead, they have been kept in a state of limbo for several
31 months, not knowing when or if they will be called back to sit
32 on the case. Long range plans for vacations, jobs, etc. un-

1 undoubtedly have been thrown into disarray. Moreover, it is still
2 impossible for the jurors to make new plans, for they do not
3 know when the trial will begin and end. If the trial begins in
4 December, the jurors will be tied up until March or April, almost
5 a year after they were first sworn and more than half a year
6 after the conclusion of their normal term. Such a lengthy period
7 of uncertainty and sacrifice is not a reasonable burden to place
8 upon ordinary citizens who have their own lives to which they
9 must attend. To force these jurors to continue to sit for this
10 case undoubtedly will create undercurrents of anger and resent-
11 ment directed against the defendants, ^(who seemed to stay of the trial) whom they may blame not
12 only for the delay, but for the existence of the trial itself.
13 Especially when the trial will be long, and the Court will find
14 it necessary to enforce often severe restraints against the usual
15 freedoms of the jurors during that period, the defendants are
16 entitled to a jury upon whom such restraints have not been ^{operating} worked
17 for four months prior to trial, and which has not already built up
18 resentment against the restraints so imposed.

19 The prejudicial effects of such a long delay upon a
20 sworn jury cannot be overcome by cautionary instructions of the
21 type this court delivered to the jurors on August 9th. Even the
22 most scrupulously responsible juror cannot maintain his guard for
23 such a drawn out period of time against media reports and other
24 controversy regarding a case of great public interest. Unlike
25 the situation when such a case actually is being tried, the court
26 cannot reemphasize on a day-to-day basis how important it is that
27 jurors avoid all public or private discussion of the facts or
28 ^{1/} issues involved. As the trial delay stretches from days to weeks

30 ^{1/} This point was recognized by the Solicitor General in his
31 Application to Set Aside Stay Granted by Mr. Justice Douglas
(July 31, 1972), at p. 9, where he stated:

32 "Moreover, since the jurors have not been
sequestered, it will be virtually impossible
(Cont'd)

good
1 to months, the immediacy of the judge's warning recedes from
2 memory, and the necessity for following it to the letter seems
3 exaggerated and unduly burdensome. The possibility that social
4 relationships may have developed among some jurors increases
5 the chances that discussions of the trial have occurred and
6 opinions have been formed. Moreover, once information concerning
7 a pending trial does seep through to an impanelled juror, it
8 cannot help but have an impact upon him of greater significance
9 than its impact upon an ordinary citizen. An impanelled juror
10 is particularly sensitized to the issues of his case, and can
11 easily be infected by outside influences. It is for these
12 reasons that the Court of Appeals for the Third Circuit has
13 stated that:

14 "Long delays in [criminal] proceedings are
15 unquestionably inimical to our system of
16 justice and should not be countenanced save
17 for compelling reasons. In instances where
18 a short stay will not suffice, the trial
19 judge should. . . grant a mistrial." United
20 States v. Alker, 260 F. 2d 135, 159 (3rd
21 Cir. 1958), cert. den. 359 U.S. 906.

Insert A
(2) The dangers inherent in maintaining an impaneled
20 jury over a four to five month period of trial interruption are
21 especially real in the circumstances surrounding this case. The
22 interruption in the instant case took place during the period
23 of the recently concluded Presidential election campaign.
24 During that campaign, the Vice-President of the United States
25 made several significant and widely publicized statements con-
26 cerning the motives, the guilt, and the patriotism of the
27 defendants herein. On the widely viewed national television

28 1/ (Cont'd)

29 for them, as a practical matter, to avoid all
30 contacts and comments about the case. That is
31 hard enough while a trial is going on, but as
32 the sworn jurors in the case, circulating in
the community, the chance that many influences
would reach them -- though entirely innocently --
would be very great."

1 program, Issues and Answers, the Vice-President was questioned
2 about the actions of operatives of the Committee to Re-elect
3 the President in the so-called Watergate Affair and related
4 instances of alleged criminal activity:

5 "MR. KAPLOW: But it is a fact that they
6 are under indictment. Has not there been
7 a pretty strong link between the Committee
8 for the Re-election, money being paid to
9 these people who were found in the Watergate?

10 "VICE PRESIDENT AGNEW: Well, I don't know
11 that. I am not certain of that. I can't
12 answer that. The trials will show - will
13 trace the flow of any campaign money. But
14 what disturbs me greatly is the moral outrage
15 of the same people who have, in the past,
16 condoned this kind of conduct. Now why do I
17 say that? I say it because certainly I think
18 it is reprehensible and I think the people
19 should be punished. And I agree with the
20 Washington Post entirely that they should
21 be punished. But I also feel that whether a
22 person steals Larry O'Brien's secret papers
23 or steals the Pentagon papers, he should be
24 punished. And I didn't see any of these
25 cries of moral indignation against the
26 person accused of stealing the Pentagon
27 papers. As a matter of fact, the same
28 publications rushed to publish these matters.

29 Now if you are going to purloin documents
30 why is there a double standard about purloining
31 re-election documents and purloining the
32 Pentagon papers.

33 "MR. GILL: Is that really a legitimate
34 comparison in all respects, Mr. Vice
35 President? You talk about purloined documents.
36 Here was a man in the Ellsberg case who was
37 involved in the study of the Pentagon papers.
38 He did not break in anywhere.

39 "VICE PRESIDENT AGNEW: Well, we don't know
40 that. We don't know whether he broke in or
41 not.

42 "MR. GILL: He wasn't caught doing it.

43 "VICE PRESIDENT AGNEW: Maybe that excuses
44 him in your eyes but it doesn't in mine.

45 "MR. GILL: No, I am merely asking a question.
46 I am not excusing, defending or convicting
47 him, but he came into possession of them, in
48 his original possession of them, legiti-
49 mately and legally. Now I will not debate
50 any point in this thing but his possession
51 of them came about lawfully. When we speak

1 about Watergate, we talk about breaking and
2 entering, outright burglary and bugging.
Isn't there a difference?"

3 A.B.C.'s Issues and Answers (Oct. 29, 1972), Transcript of
4 Proceedings, pp. 13-14 (a copy of which is attached as
5 Appendix A, hereto) (emphasis added). These highly
6 inflammatory charges became an important issue in the election
7 campaign. The nationally syndicated New York Times columnist,
8 Tom Wicker, took issue with the Vice-President's charges in
9 his column of October 31, 1972. (a copy of which is attached
10 as Appendix B hereto). Mr. Wicker's column was read over
11 radio station KPSK in Los Angeles, giving wide curculation to
12 his views and to those of the Vice-President.

13 In addition to the above charges, it seems that the
14 Committee to Re-elect the President was directly or indirectly
15 involved in further efforts to discredit at least one of the
16 defendants as a means of creating an election issue. Time
17 Magazine reported in its issue of October 23, 1972 that

18 "Bernard Barker, the former C.I.A. agent
19 who led the raiding party into the Watergate,
20 recruited nine Cubans from Miami in early
21 May and assigned them to attack Daniel
22 Ellsberg, the man who released the Pentagon
23 papers to the public. Barker flew the
24 Cubans to Washington first class, showed
25 them a picture of Ellsberg, and told them:
26 'Our mission is to hit him - to call him a
27 traitor and punch him in the nose. Hit him
and run.' The site chosen was outside the
Capitol rotunda, where the body of J. Edgar
Hoover was lying in state. The idea was to
28 denounce Ellsberg, who was holding a rally on
29 the steps, and start a riot. As it turned
out, the 'riot' ended after a brief flurry of
punches, most of which landed on Ellsberg's
bodyguard."

30 More Fumes From the Watergate, Time Magazine (Oct. 23, 1972),
31 p. 23 (emphasis added).

32 The court's instructions to the jurors on August 9th
cautioned them against reading or listening to anything to do
with this case, pending its continuation and/or conclusion.

1 Nothing was said about avoiding issues of relevance to the
2 election campaign. Indeed, it is quite doubtful that any
3 court constitutionally could order a juror to refrain from
4 reading about, listening to, or discussing issues relating to
5 a Presidential election campaign, at least for a period of
6 over four months that included virtually the entire campaign
7 period. In any event, it is reasonable to assume that these
8 jurors exercised their rights and responsibilities as American
9 citizens to inform themselves on the issues in the campaign.
10 One of the major issues was the Watergate Affair, out of which
11 controversy arose the Vice President's charges against the
12 instant defendants and the reported assaults on defendant
13 Ellsberg. Another major issue in the campaign was the
14 Administration's handling of the Vietnam War, which involved
15 considerable discussion of questions raised by the release of
16 the Pentagon Papers. It is naive to assume that in informing
17 themselves on these important issues, the jurors were not
18 confronted with the references made to the defendants and
19 their actions. Given their sensitivity as jurors to the issues
20 of this case, the danger of prejudicial infection in the
21 context of an often bitter and vituperative campaign is
22 manifest. In such a situation, the admonition of the Third
23 Circuit in the Alker case, supra, that a mistrial should be
24 declared when there is long delay in a criminal trial is of
25 special moment. At the least, there is a prima facie case of
26 prejudice and "the government should [be] the one to seek to
27 establish that no juror [has] had these matters come to his
28 attention." Calo v. United States, 338 F. 2d 793 (1st Cir.
29 1964). See Briggs v. United States, 221 F. 2d 636 (6th Cir.
30 1955).

31 (3) Federal district courts possess broad dis-
32 cretionary authority to order mistrials, "when particular

1 circumstances manifest a necessity for so doing, and when failure
2 to discontinue would defeat the ends of justice." Wade v.
3 Hunter, 336 U.S. 684, 690; Brock v. North Carolina, 344 U.S.
4 424, 427.

5 The long delay and the prejudicial publicity surround-
6 ing this case warrant the use of that discretionary authority.
7 The Fifth Circuit stated the standard that a trial judge should
8 apply in deciding whether to grant a mistrial for prejudicial
9 publicity:

10 "In making his determination, the trial
11 judge must consider such things as (1)
12 the character or nature of the information
13 published, some being more sensational or
14 penetrating than others; (2) the time of
15 the publication in relation to the trial;
16 (3) the credibility of the source to
17 which the information is attributable;
18 and (4) the pervasiveness of the
19 publicity. . . ." Gordon v. United States,
20 438 F. 2d 858, 873 (5th Cir., 1971).

21 Here, the charges published and broadcast not only are inflamma-
22 tory, but, coming in part from the second highest official in
23 the country, are highly prejudicial. The charges came at the
24 worst possible time in relation to the trial, i.e., during a
25 long recess when the jury was dispersed into the community.
26 The source of the charges -- the Vice President -- enjoys a
27 great amount of credibility because of his office. Finally, the
28 publicity was quite pervasive and came during a time when people
29 were especially attentive to public affairs and politics.

30 The considerations that sometimes weigh against granting
31 a motion for mistrial simply are not operative in the instant
32 case. Defendants have waived any double jeopardy rights that
might arise from a mistrial order. The choosing of a new jury
will not involve much additional expense and delay, as an
extensive voir dire of the current jury would be required even
if the mistrial motion is not granted at this time.

The fact that the trial interruption resulted in part

1 from the defendants' petitions for mandamus and certiorari is
2 irrelevant, especially in light of the waiver of double jeopardy.
3 Defendants had a right to raise the issues regarding wiretapping,
4 issues that both the Court of Appeals, in granting a stay to
5 hear the mandamus petition on its merits, and Mr. Justice Douglas
6 in granting a stay pending decision on a petition for certiorari,
7 found to raise substantial constitutional questions. Defendants
8 cannot be forced to choose between their rights to raise those
9 constitutional issues and their right to a fair trial before an
10 impartial jury uninfected by prejudice. Cf., United States v.
11 Fratello, 44 F.R.D. 444. Moreover, had the government not
12 delayed for so long in responding to defendants' motions for
13 disclosure of electronic surveillance, the issues raised by the
14 petitions for mandamus and certiorari would have arisen prior
15 to the empanelling of the present jury.

16 In short, the long recess of the trial proceedings
17 for a period of at least four months, together with the inflamed
18 public atmosphere surrounding the trial due to the election
19 campaign, present compelling reasons for this court to exercise
20 its discretion to grant the motion for mistrial. There are no
21 substantial countervailing reasons why the motion should not be
22 granted. Therefore, the motion for mistrial should be allowed.

23 Dated,

24 A

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